

STATE OF NEW JERSEY
DEPARTMENT OF LAW & PUBLIC SAFETY
DEPARTMENTAL MEMORANDUM

TO: DCR Regional Offices

FROM: Craig Sashihara, Director
Division on Civil Rights

DATE: November 16, 2012

RE: Reliance on HUD Guidance: Housing Exemption for Older Persons

Last week, the U.S. Department of Housing & Urban Development (HUD) issued a guidance document entitled, "Fair Housing Act Considerations Regarding Housing for Older Persons and Evacuees of Hurricane Sandy." (See attached).

HUD intends to exclude units occupied by Hurricane Sandy evacuees when calculating whether a housing facility has the requisite percentage of units occupied by persons 55 or older to invoke the exemption for older persons. As you know, the New Jersey Law Against Discrimination (LAD) has a similar exemption. See N.J.A.C. 13:15-1.5 (exempting housing facilities from the ban against familial status discrimination if they can show, among other things, that at least 80% of the units are occupied by "at least one person 55 years of age or older per unit.")

Given the critical housing needs of our fellow residents impacted by Hurricane Sandy, the HUD guidance makes sense. Housing facilities should not become vulnerable to prosecution under the LAD for allegations of familial status discrimination simply because they chose to provide housing to evacuees. Because it is a good idea, and to encourage more facilities to open their doors to displaced residents, and in keeping with our efforts to ensure that our state law is substantially equivalent to corresponding federal legislation, please immediately follow the attached guidance in interpreting the "housing for older persons" exemption under the LAD.

Nothing herein should be construed to suggest that housing facilities for older persons are somehow exempt from the LAD's prohibition of discrimination against current/potential residents on the basis of race, creed, color, national origin, ancestry, sex, gender identity or expression, affectional or sexual orientation, marital status, civil union status, domestic partnership status, disability, nationality, or source of lawful income used for rental or mortgage payments. As always, feel free to call me if you have any questions or concerns. Thank you.

Attachment

- c. Gary LoCassio, Deputy Executive Director, DCR
Jay Golden, Region II Director, HUD
Cristina Rodriguez, Equal Opportunity Specialist, HUD



U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, DC 20410-2000

ASSISTANT SECRETARY FOR
FAIR HOUSING AND EQUAL OPPORTUNITY

November 7, 2012

MEMORANDUM FOR: All FHEO Regional Directors

FROM: John Trasviña, Assistant Secretary for Fair Housing and Equal Opportunity, E

SUBJECT: Fair Housing Act Considerations Regarding Housing for Older Persons and Evacuees of Hurricane Sandy

In support of federal efforts to address the immediate housing needs of those impacted by Hurricane Sandy, the Department wishes to encourage providers of housing for older persons to make vacant dwellings available to storm evacuees. Similar to action following the devastation in the Gulf Coast during 2005, the Office of Fair Housing and Equal Opportunity is issuing guidance to afford flexibility in the use of unoccupied units of housing for older persons for Hurricane Sandy evacuees. As outlined in the attached *Questions and Answers on Hurricane Sandy Evacuees in Housing for Older Persons*, a provider of housing for older persons may make units available to evacuees under the age of 55 and continue to qualify for the Fair Housing Act's familial status exemption, as long as the vacant units are made available without restriction on the basis of familial status.

The Fair Housing Amendments Act of 1988 (the Act), amended by the Housing for Older Persons Act of 1995 (HOPA), exempts certain communities from the Act's prohibition against familial status discrimination, provided they demonstrate their intent to provide "housing for older persons." For a community or facility to qualify for the "housing for older persons" exemption, the Act requires, among other things, that 80% of all occupied households be occupied by at least one person 55 years of age or older (The remaining 20% of units may be occupied by persons under age 55, and the housing provider may still qualify for the exemption.). The Department does not count unoccupied units and units occupied by caretakers and maintenance workers when evaluating whether an elderly housing development meets the 80% threshold.

The Department recognizes that managers and residents of "55 and over" communities would like to make housing available to those displaced by Hurricane Sandy. The Department interprets the Fair Housing Act's "housing for older persons" exemption as broad enough to allow "housing for older persons" developments, in the wake of this storm, to admit evacuees under the age of 55 and not count them toward the 80% and 20% calculations, so long as the housing provider admits evacuees regardless of familial status. Providers of housing for older persons, like all housing providers, must not discriminate on the basis of race, color, religion, sex, national origin, and disability.

For purposes of evaluating the thresholds, the Department will exclude evacuee households from that calculus and treat them similarly to caretakers and maintenance workers. This interpretation of the Act's housing for older persons exemption does not provide any new substantive rights.

The attached questions and answers illustrate the application of these principles.

Attachment

Questions and Answers on Hurricane Sandy Evacuees in Housing for Older Persons

Question 1

May housing for older persons admit evacuees under the age of 55 and retain its exemption from the familial status provisions of the Fair Housing Act? If so, how will evacuees be counted for purposes of the exemption?

Answer

Housing for older persons may admit evacuees under the age of 55 and retain its exemption from the familial status provisions of the Fair Housing Act. If housing for older persons admits evacuees without regard to familial status, the Department will consider the units where younger evacuees reside to be unoccupied units, and will exclude them from the count of occupied units, 80% of which must be occupied by at least one person 55 or older.

Treating units occupied by evacuees as unoccupied units and excluding them from the 80% calculation is consistent with how other types of units are treated under the HOPA. Other units similarly excluded from the 80% calculation include: (1) unoccupied units; (2) units occupied by employees of the housing for older persons who are under the age of 55, and who provide substantial management and maintenance services to the housing for older persons; and (3) units occupied solely by persons who are necessary or essential to provide medical and/or health and nursing care services as a reasonable accommodation to residents.

Question 2

Can housing for older persons decide that the only evacuees it will admit are those without children?

Answer

Yes, but if housing for older persons chooses to admit evacuees, but excludes evacuee families with children, the units where evacuees reside will be counted among the occupied units as other residents. Only if the housing for older persons admits evacuees without regard to familial status will the Department consider the units where younger evacuees reside to be unoccupied units.

Question 3

Is housing for older persons required to admit evacuees that are under age 55?

Answer

No. Housing for older persons may choose not to admit evacuees under age 55.

Question 4

For the purposes of the "housing for older persons" exemption, who is an evacuee?

Answer

Anyone who, at the time of Hurricane Sandy, lived in a county declared to be a disaster area and

designated for individual assistance from FEMA.

Question 5

Does someone need to show proof of being an evacuee? If so, how?

Answer

The Department does not require that someone show proof of being an evacuee. In the event of an investigation of a complaint of discrimination under the Fair Housing Act, the Department will accept a self-certification or other evidence from housing for older persons that the evacuees formerly resided in one of the affected counties.

Question 6

How long can housing for older persons admit and house younger evacuees?

Answer

Housing for older persons may choose to impose a time limit on admitting and housing younger evacuees. However, the Department would encourage housing for older persons to admit and house evacuees for as long as there is a need.

Question 7

May housing for older persons impose different terms and conditions of residency on families with children who reside there?

Answer

Yes. Housing for older persons is exempt from the Fair Housing Act's prohibition against discrimination on the basis of familial status. Housing for older persons may restrict families with children from benefits of the facility or otherwise treat family households differently than senior households, including use of a swimming pool or clubhouse, as long as those actions do not violate state or local law. However, housing for older persons is not exempt from the provisions of the Fair Housing Act that prohibit discriminating against any resident or potential resident on the basis of race, color, religion, national origin, sex, or disability.

However, housing for older persons is not required to impose different terms and conditions on families with children. The Department strongly encourages housing for older persons to exercise sensitivity and compassion when deciding whether to impose different terms and conditions on families with children that reside there.

Question 8

Can housing for older persons ask an evacuee to move in order to make space for an individual 55 or older without violating the Fair Housing Act?

Answer

Yes. While the exemption from the familial status provisions of the Fair Housing Act would not prohibit housing for older persons from asking an evacuee to move, other governing authorities such as state or local landlord-tenant laws may apply. Housing for older persons is still prohibited under the Fair Housing Act from discriminating against evacuees on the basis of race, color,

religion, national origin, sex, or disability.

Question 9

Can housing for older persons advertise that it is accepting evacuees under age 55 without losing its exemption?

Answer

Yes. Housing for older persons may choose to advertise through a website, newsletter or other means that it will accept evacuees under age 55, as long as the advertisements comply with the Fair Housing Act's non-discrimination requirements and the advertisements indicate that the community is housing for older persons.

Question 10

Is housing for older persons required to advertise that it will accept evacuees under age 55?

Answer

No. A housing community or facility may choose to advertise that it will accept evacuees under age 55, but is not required to advertise.

Question 11

If more evacuees are interested in living at housing for older persons than there are vacancies, how should the housing community or facility decide which evacuees get housing?

Answer

Housing for older persons choosing to admit evacuees should apply consistent, nondiscriminatory procedures. For example, housing for older persons may choose to create a wait list for evacuees searching for housing, if it is administered without regard to race, color, religion, sex, national origin, and disability. As explained in Question 2, only if the housing for older persons admits evacuees without regard to familial status will the Department consider the units where younger evacuees reside to be unoccupied units.

Question 12

Is housing for older persons required to provide evacuees with special financial considerations in the sale or rental of its units?

Answer

No. Housing for older persons may require evacuees to meet the same qualifications for the sale or rental of units as non-evacuee tenants or owners.

Question 13

How will the Department treat a complaint filed by an evacuee against housing for older persons, alleging familial status discrimination in violation of the Fair Housing Act?

Answer

The Department will conduct a limited complaint inquiry to determine if the housing community or

facility qualifies as housing for older persons. If the housing community or facility qualifies, the Department will dismiss the familial status discrimination complaint.

Question 14

How will the Department treat a complaint filed by an evacuee against housing for older persons, alleging discrimination in violation of the Fair Housing Act on another prohibited basis (i.e., race, color, religion, sex, national origin, disability)?

Answer

The Department will process complaints filed by evacuees living in housing for older persons alleging discrimination under the Fair Housing Act on the basis of race, color, religion, sex, national origin, or disability, under its customary procedures.